UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. RALPH R. CIOFFI and MATTHEW M. TANNIN, Defendants.	No. 08 Civ. 2457 (FB) (VVP)

DEFENDANT MATTHEW M. TANNIN'S MEMORANDUM OF LAW IN OPPOSITION TO THE GOVERNMENT'S APPLICATION TO INTERVENE AND TO STAY

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Defendant Matthew M. Tannin respectfully submits this memorandum of law in opposition to the application of the United States Attorney for the Eastern District of New York ("USAO") to intervene and to stay this action in its entirety until completion of the parallel criminal case against Mr. Tannin and the ongoing criminal investigation.

INTRODUCTION

On June 19, 2008, the Securities and Exchange Commission ("SEC") filed this civil action against Mr. Tannin, a former employee of Bear Stearns Asset Management ("BSAM"), alleging that he fraudulently misled investors about the financial state of two of the firm's hedge funds. That same day, the USAO unsealed an indictment charging Mr. Tannin with conspiracy, securities fraud, and wire fraud. The SEC and the USAO announced their cases in a joint press conference.

In announcing the charges, the SEC stated that it is "aggressively investigating possible fraud, market manipulation, and breaches of fiduciary duty that may have contributed to the recent turmoil in the credit markets." U.S. Securities and Exchange Commission Litigation Release No. 20625, dated June 19, 2008 (Ex. A).[1] Shortly thereafter, the Chairman of the SEC testified before the U.S. Senate that the SEC's "mission to protect investors, maintain orderly markets, and promote capital formation is more important now than it has ever been," and pointed to the SEC's enforcement action against Mr. Tannin as a prime example of the SEC's "vigorous commitment to investors." Chairman Christopher Cox, *Testimony Concerning Recent Developments in the U.S. Financial Markets and Regulatory Responses*, before the U.S. Senate Committee on Banking, Housing and Urban Affairs, July 15, 2008 (Ex. B). Mr. Cox also stated that "[t]hose who commit fraud at the expense of investors will always be the target of a relentless SEC." *Id.*

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[1] All references to "Ex." are to exhibits to the Declaration of Nina Beattie in Support of Defendant Matthew M. Tannin's Opposition to the Government's Application to Intervene and to Stay, dated October 3, 2008 ("Beattie Decl.").

Having maximized the publicity attained from launching these two actions simultaneously and in the process having made Mr. Tannin a scapegoat for the collapse of the global credit markets, the USAO comes before the Court and seeks a blanket and indefinite stay of the SEC action. It does so with the tacit approval of the SEC, which takes "no position" on the stay application. *See* Response of SEC to USAO's Application to Intervene and Stay ("SEC Response") at 2. The SEC's acquiescence in stopping this lawsuit is entirely inconsistent with its public pronouncements regarding the SEC's "relentless" and "vigorous" enforcement efforts.

The USAO's application for a blanket and indefinite stay is premature and unwarranted. The USAO makes no showing, as it must, of any identifiable harm that would result from discovery in the SEC action. The USAO simply claims in a generic and conclusory fashion that discovery will interfere with what it says is its ongoing criminal investigation – an investigation that will be completed in the next two months[2] – and that a blanket stay is necessary to prevent Mr. Tannin from taking "unfair advantage" of the civil discovery rules. *See* Gov't Mem. in Supp. of Stay ("Gov't Mem.") at 13.

In contrast to the speculative and undefined harm that the government posits, Mr. Tannin will suffer significant and real prejudice if a blanket and indefinite stay is entered. Such a stay would deprive Mr. Tannin of the chance to defend himself against the SEC charges after having had his reputation attacked by the government's coordinated legal and media strategy. Proceeding with this case would not, as the USAO contends, grant Mr. Tannin an "unfair advantage." If any party has had an unfair advantage it is the government, which has already obtained extensive discovery, including from Mr. Tannin, for use in the civil and criminal cases. At the crux of the USAO's application is the government's effort to preclude Mr. Tannin entirely from investigating the facts and from defending himself.

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[2] At the September 26, 2008 status conference in the parallel criminal case against Mr. Tannin, the Court ordered the USAO to file any superseding indictment by December 5, 2008. At the June 26, 2008 status conference, the USAO represented that it would not be adding any new defendants to the superseding indictment. Beattie Decl. ¶ 5.

When faced with stay requests in parallel civil and criminal proceedings, courts must exercise their substantial discretion to determine whether and how the civil action may proceed. A blanket stay is neither required nor appropriate in most circumstances. Rather, to avoid undue prejudice, the court must weigh the equities and fashion a remedy that is narrowly tailored to address a specific harm, such as imposing limits only on certain discovery. Rejection of a blanket stay is particularly warranted when the government has created the alleged conflict between the civil and criminal cases by initiating the actions at the same time.

Indeed, the USAO's papers ignore the recent decisions from courts in this district and elsewhere, which have been highly critical of stay requests from the government when the government has coordinated the filing of the civil and criminal actions. These courts have recognized that the government should not be able to use parallel proceedings to its advantage and then be relieved of the expected consequences, without a showing of specific prejudice. Under such circumstances, a blanket and indefinite stay is fundamentally unfair to the defendant and a misuse of the process of the courts.

The USAO's application to intervene and to stay this action in its entirety should be denied to allow Mr. Tannin to begin his investigation of the facts and to prevent the government from abusing the court system for its own tactical advantage.

FACTUAL BACKGROUND

Mr. Tannin is the former chief operating officer and a portfolio manager of two hedge funds, the Bear Stearns High-Grade Structured Credit Strategies Fund and the Bear Stearns

High-Grade Structured Credit Strategies Enhanced Leveraged Fund. Compl. ¶ 14. Beginning in early 2007, the funds suffered losses to the value of their portfolios. Compl. ¶ 2.

The government began investigating the funds in the summer of 2007 when the demise of the funds became apparent, with the SEC requesting that Bear Stearns provide documents and materials relating to the funds. Compl. ¶ 119. The investigation lasted more than a year and proceeded as a collaborative effort among the SEC, the USAO, and the FBI, including joint interviews of witnesses. During the investigation, the government received voluminous documents and interviewed potential witnesses. *See* U.S. Mem. of Law in Supp. of Motion to Intervene and Stay Discovery in *Navigator Capital Partners, L.P.* v. *Bear Stearns Asset Management, Inc.*, Index No. 07/602663, dated May 7, 2008, at 2 (Sup. Ct. N.Y. Cty.) (Ex. C). As part of that investigation, Mr. Tannin produced documents to the SEC in response to a subpoena and other SEC requests. Beattie Decl. ¶ 2.

The indictment against Mr. Tannin was returned on June 18, 2008, *see* Indictment (Ex. D), but, at the government's request, was immediately sealed. The next day, the government staged a highly-publicized "perp walk," parading Mr. Tannin before reporters in handcuffs. It chose to do so despite Mr. Tannin's repeated efforts to arrange a voluntary surrender.[3] The government followed the "perp walk" with the unsealing of the indictment and a press conference during which the SEC and the USAO jointly announced their filing of simultaneous civil and criminal charges against Mr. Tannin.[4] The USAO acknowledged the collaborative

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3 *See* Beattie Decl. ¶ 4 and Letters of June 13, 2008 and June 18, 2008 (Exs. E & F).

4 The court in *SEC* v. *Bradstreet*, No. 95 Civ. 11647 (D. Mass.), when faced with a similar media strategy in parallel civil and criminal actions, was highly critical of the government's conduct:

> It is somewhat unusual . . . to seal an indictment . . . to permit a press availability. At least it's unusual in my experience. Now, perhaps I'm innocent. Perhaps I haven't seen very much go on in the United States

nature of the investigation during the joint press conference: "I would like to take a moment to recognize and thank our partners in this investigation. First, the Federal Bureau of Investigation, which investigated this case . . . and the enforcement division of the United States Securities and Exchange Commission. As you know, we often conduct parallel investigations with the SEC and we rely on their expertise in developing these complex cases. Both of our partners contributed resources necessary to get the job done, and I would like to thank them for their assistance in this case." Transcript of June 19, 2008 Press Conference ("June 19 Press Conf. Tr.") at 3, statement of Benton J. Campbell, U.S. Attorney for the Eastern District of New York. (Ex. H). *See also* SEC Litigation Release No. 20625 (Ex. A).

The press conference was widely covered, including live on CNBC, and the government's charges appeared on the front page of every major newspaper. Since then, the charges continue to be discussed and analyzed in newspapers and other media outlets across the world. As a result, Mr. Tannin's reputation has been severely damaged.

ARGUMENT

I. THE COURT SHOULD REJECT THE USAO'S APPLICATION FOR A BLANKET AND INDEFINITE STAY

In general, simultaneous criminal and civil actions, including discovery, "are unobjectionable under our jurisprudence." *SEC* v. *Dresser Indus., Inc.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980). A stay is warranted only where the moving party can demonstrate "'special

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> Attorney's Office. Perhaps I haven't seen very much of interplay between the Securities Exchange Commission, for whom I worked for two years, and the United States Attorney's Office, for whom I worked for four years. But I must tell you that I have never seen an indictment sealed to permit a press availability.

Bradstreet, Oct. 16, 1995 Hearing Tr. at 9:7-9:18 (Ex. G).

circumstances' in which the nature of the proceedings demonstrably prejudices substantial rights" of a party. *Id.* at 1377 (citing *United States* v. *Kordel*, 397 U.S. 1, 11-13 (1970)).

In resolving stay applications in parallel civil and criminal proceedings, the court has substantial and broad discretion to determine whether and how discovery should proceed. *See Landis* v. *North American Co.*, 299 U.S. 248, 254-55 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes of its docket."). As the Fifth Circuit observed in *Campbell* v. *Eastland*, 307 F.2d 478 (5th Cir. 1962):

> Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other. In some situations it may be appropriate to stay the civil proceeding. In others it may be preferable for the civil suit to proceed – unstayed. In the proper case the trial judge should use his discretion to narrow the range of discovery.

Id. at 487 (citation omitted). The court thus must balance the competing concerns and strive to conserve all interests at stake in determining what type of remedy is warranted. No one type of relief is mandated. Rather, the court has a range of options. It can stay the civil proceedings, temporarily postpone discovery, impose appropriate protective orders and conditions on discovery, or allow the civil action to proceed unimpeded. *Dresser*, 628 F.2d at 1375; *see also In re Ivan Boesky Sec. Lit.*, 128 F.R.D. 47, 49-50 (S.D.N.Y. 1989). But any limitation on discovery must be narrowly tailored to address identifiable prejudice.

The USAO, no less than any other litigant, thus must "make out a clear case of hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 255. *See also* Hon. Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 209 (March 1990) (in civil cases, there is "a strong presumption in favor of discovery that any party – the Government no less than other litigant – must overcome if it seeks to withhold production or depositions"). To justify a stay or limitation on discovery, the USAO must come forward with "'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" *United States* v. *Banco Cafetero Int'l*, 107 F.R.D. 361, 366 (S.D.N.Y. 1985), *aff'd*, 797 F.2d 1154 (2d Cir. 1986) (quoting *General Dynamics Corp.* v. *Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973)).

The USAO fails to meet its heavy burden to justify a blanket and indefinite stay for several reasons. First, the recent trend in this district and elsewhere is to deny stay applications where the discovery sought to be avoided is the direct result of the government's decision to proceed with simultaneous civil and criminal cases and the government has failed to make a showing of identifiable prejudice.

Second, the factors courts consider when deciding to grant or deny a stay strongly favor denial of a blanket stay. Mr. Tannin would be severely prejudiced by a such a stay. He has a strong interest in resolving this action so that he can clear his name, and a blanket stay would prevent him from preparing his defense. In contrast, the USAO has made no attempt to demonstrate any specific prejudice that would result from discovery in the SEC action and no attempt to tailor a stay to specific circumstances. Instead, it makes only the bold assertion that delaying the civil case would conserve resources because a conviction in the criminal case would resolve the civil case. Not only is such speculation insufficient to support the USAO's request for a blanket stay, it is extremely inappropriate as it contravenes the presumption of innocence to which Mr. Tannin is entitled. Mr. Tannin fully expects to be acquitted in the criminal case and to prevail in the civil case, and he is entitled to prepare for his defense in both.

Finally, if the Court has any concerns about discovery in this action, the appropriate solution is to impose specified limits on discovery that address particular concerns as they arise, not to impose an all-inclusive stay before discovery has even commenced.

A. Courts Recognize the Inequity of a Stay Where the Government Has Created the Alleged Conflict Between the Civil and Criminal Actions

In some instances, courts may be receptive to government stay requests in civil cases brought by parties other than the government. But where, as here, the government has created the alleged conflict between the civil and criminal actions, courts have been extremely critical and skeptical of the government's attempt to prevent a defendant from conducting discovery in the civil action.[5] In denying the government's request for a stay under circumstances similar to those here, Judge Jed Rakoff, a former federal prosecutor who served as a Chief of a Business and Securities Fraud Prosecutions Unit for two years, astutely observed the problems raised by a government stay request in a civil action brought simultaneously with a related criminal case:

> Although applications for a stay similar to the one here made by the U.S. Attorney are not uncommon in such "parallel proceedings" situations, they are not without their bizarre aspects. It is bewildering enough that Congress has decreed that, even though someone facing the potentially ruinous financial penalties of an SEC complaint should be accorded substantial discovery in order to defend herself, the same defendant facing

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[5] The numerous cases the USAO cites where the civil proceedings were instituted by a criminal defendant or third party – not the government as part of a coordinated federal effort – are thus, for the most part, not on point and do not support the USAO's request for a blanket stay under the circumstances here. *See, e.g., Campbell*, 307 F.2d 478; *Twenty First Century Corp.* v. *LaBianca*, 801 F. Supp. 1007 (E.D.N.Y. 1992); *Board of Governors of Federal Reserve Sys.* v. *Pharaon*, 140 F.R.D. 634 (S.D.N.Y. 1991); *Raphael* v. *Aetna Cas. & Sur. Co.*, 744 F. Supp. 71 (S.D.N.Y. 1990); *Nakash* v. *United States Dep't of Justice*, 708 F. Supp. 1354 (S.D.N.Y. 1988); *First Merchants Enter., Inc.* v. *Shannon*, No. 88 Civ. 8254, 1989 WL 25214 (S.D.N.Y. Mar. 16, 1989); *Bridgeport Harbour Place I, LLC* v. *Ganim*, 269 F. Supp. 2d 6 (D. Conn. 2002); *Souza* v. *Schiltgen*, No. 95 Civ. 3997, 1996 WL 241824 (N.D. Cal. May 6, 1996); *R.J.F. Fabrics, Inc.* v. *United States*, 651 F. Supp. 1437 (Ct. Int'l Trade 1986).

Cases where the defendant in the civil case sought a stay, *see, e.g., Brock* v. *Tolkow*, 109 F.R.D. 116 (E.D.N.Y. 1985); *Volmar Distribs., Inc.* v. *N.Y. Post Co.*, 152 F.R.D. 36 (S.D.N.Y. 1993), and civil actions where no indictment was filed simultaneously likewise do not apply. *See, e.g., SEC* v. *Chestman*, 861 F.2d 49 (2d Cir. 1988); *SEC* v. *Downe*, No. 92 Civ. 4092, 1993 WL 22126 (S.D.N.Y. Jan. 26, 1993).

Also, in many of the cases upon which the USAO relies, the government sought only a limited stay of certain discovery, in contrast to the absolute bar sought here.

> the even more severe penalties of a criminal action should barely receive any discovery at all. But it is stranger still that the U.S. Attorney's Office, having closely coordinated with the SEC in bringing simultaneous civil and criminal actions against some hapless defendant, should then wish to be relieved of the consequences that will flow if the two actions proceed simultaneously.

SEC v. *Saad*, 229 F.R.D. 90, 91 (S.D.N.Y. 2005).

The court's opinion in *SEC* v. *Sandifur*, No. 05 Civ. 1631, 2006 WL 3692611 (W.D. Wash. Dec. 11, 2006), summarizes well the current state of the law where the government seeks a stay of a parallel civil proceeding brought by another litigating arm of the government. In *Sandifur*, the SEC filed a civil complaint alleging securities fraud only four days after the United States filed an indictment alleging similar facts. The USAO then sought to stay the depositions of several witnesses, asserting the same argument the USAO makes here – that allowing the civil discovery process to continue would enable the defendant to obtain discovery that is not authorized in the criminal case. In denying the motions, the court noted,

> [a]lthough courts have been receptive to Government stay requests in civil cases brought by parties other than the Government, results in recent years have been markedly different when the Government itself brings a civil lawsuit simultaneous with a criminal proceeding. Courts regularly deny stays when civil regulators have worked directly in concert with the criminal prosecutors during the investigation and the Government has used parallel proceedings to its advantage.

Id. at *2. The court found that the USAO had "failed to show any real prejudice that would result from the simultaneous progression of both civil discovery and the criminal case." *Id.* at *3. "Had the Government thought this was a serious problem," the court remarked, "it could have easily avoided it by waiting until after the criminal matter was resolved to institute civil proceedings." *Id.* at *3. Instead, the USAO "worked directly with the SEC and voluntarily chose to institute both civil and criminal actions at the same time," resulting in "very serious civil charges" against the defendants. *Id.* The court thus concluded that the government's generalized arguments about prejudice and the need to protect the integrity of the criminal process carried "little weight" in light of the "strong interest" of the defendants "in a timely resolution" of the charges against them. *Id.*

The court in *SEC* v. *Reyes*, No. 06 Civ. 4435, No. 06 Cr. 0556 (N.D. Cal.), a recent stock options backdating case, reached the same conclusion. After a lengthy investigation of stock option granting practices at Brocade Communications Systems ("Broadcom"), the SEC filed a civil enforcement action against several officers at the company. The same day, the United States filed a criminal action against two of the defendants in the SEC case. The SEC and the USAO held a joint press conference to announce the charges, which was widely covered by the press. Shortly after the charges were filed, the USAO filed a motion to intervene and stay discovery, which the SEC did not oppose. At the hearing on the motion to stay, Judge Charles Breyer, the assigned judge for both the civil and criminal actions, commented:

> [I]t appears to me that when the SEC decides they want to charge people with a violation of securities laws, which they are entitled to do and have a right to do and duty to do, they invite, of course, the defense to respond; and the defendant has the right to respond in civil litigation, and so I don't understand the logic if the SEC is filing charges against people and then saying, "Oh, by the way, don't do any discovery, we'll wait a year or so".
>
> When I say I don't understand the logic, what I am saying is I don't really appreciate the fundamental fairness of that approach . . . . The decision whether or not to file charges remains with the SEC, but not when you're the plaintiff can you dictate how the defense should proceed and when the defense should proceed.
>
> When you file the charges, you are deciding the defense should proceed . . . .

SEC v. *Reyes*, No. 06 Cr. 0556 (N.D. Cal.), Oct. 4, 2006 Hearing Tr. at 5:10-5:20 (Ex. I). Accordingly, the court denied the USAO's motion to stay discovery, concluding that it would be unfair to the defendants.

The rulings in *Saad*, *Sandifur*, and *Reyes* are consistent with numerous other decisions rejecting stay requests from the government in parallel civil and criminal actions. *See, e.g., United States* v. *Gieger Transfer Serv., Inc.*, 174 F.R.D. 382, 385 (S.D. Miss. 1997) (denying stay where the government "created the conflict between the civil and criminal cases by simultaneously filing those actions," and offered only that the "civil case will have the effect of allowing [the defendants] to subvert the limitations on discovery in the pending criminal case"); *SEC* v. *Poirier*, No. 97 Civ. 3478, Order at 5 (N.D. Ga. Feb. 12, 1998) (Ex. J) (denying stay of parallel SEC case, finding that "fact that it was not the defendants, but rather two agencies of the same government, that instituted these parallel proceedings militates against the imposition of a stay in this case" and that the government "has failed to present any specific showing of potential harm that it will suffer if this action is not stayed"); *Bradstreet*, Oct. 16, 1995 Hearing Tr. at 16:3-17:7 (Ex. G) (denying stay because situation was one of the government's "own making" and government had made only "sterile incantation of the usual concerns about advance criminal discovery").

The USAO cites only one case that addresses this current trend, *SEC* v. *Nicholas*, No. 08 Civ. 00539, 2008 WL 2977480 (C.D. Cal. Aug. 4, 2008), but its brief contains no discussion or analysis of that case. *See* Gov't Mem. at 7. In *Nicholas*, the court was faced with another set of coordinated civil and criminal proceedings arising out of the Broadcom stock option investigation. Two former executives of Broadcom were charged in an SEC enforcement action and shortly thereafter indicted. Soon after the indictment was filed, the USAO moved to intervene and stay the SEC action as to the two SEC defendants also facing criminal charges. While acknowledging the recent line of cases that has rejected stays where the government has filed simultaneous civil and criminal proceedings, the court determined that a stay of the civil case pending resolution of the criminal action was appropriate. *Nicholas*, 2008 WL 2977480, at *5. However, in *Nicholas*, unlike here, the USAO represented to the court that it would provide voluminous Rule 16 discovery in the criminal matter and also that it intended to disclose SEC testimony, statements made by individuals during Broadcom's internal investigation, and all other documents the SEC collected during the course of its investigation. Further, the court noted that it had encouraged the government to disclose any additional *Brady* and Jencks Act material at the earliest practicable time so as to prevent delay in the criminal trial, and that if the USAO failed to comply with its discovery obligations or the court's directive, the court would entertain a motion to lift the stay in the civil action. *Id.* at *6.

Here, in contrast, the USAO has rejected Mr. Tannin's request that it provide Jencks Act material 90 days before trial,[6] and it seeks a blanket and indefinite stay of the SEC action without any discovery in this action. As the rulings in *Saad*, *Sandifur*, and *Reyes* indicate, the USAO's request is premature and unwarranted, particularly given that no discovery has even been propounded and no specific harm has been identified.

It is extraordinarily unfair for the government to coordinate and highly publicize its civil and criminal charges against Mr. Tannin and then immediately attempt to deprive him entirely of the opportunity to defend himself by imposing a comprehensive and indefinite stay. The USAO must have known when it coordinated its indictment and arrest of Mr. Tannin with the SEC's filing of its complaint that Mr. Tannin would seek to defend himself in the SEC action by conducting "the timely discovery that federal law grants [him] in defending such an action." *Saad*, 229 F.R.D. at 92. *See also Banco Cafetero Int'l*, 107 F.R.D. at 367 ("Having chosen to institute these proceedings, the Government must have foreseen that the [civil defendants] would

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6 *See* Letter of July 28, 2008 at 2, Request 2, and Letter of August 12, 2008 at 1 (Exs. K & L).

seek the discovery that the Government now seeks to stay on a claim of prejudice."). The USAO thus deliberately and knowingly created the situation it now seeks to avoid.

The government's conduct is also an abuse of the court system. The timing of the USAO's motion for a stay demonstrates that the SEC's role in this process was simply to maximize press coverage. As the court in *SEC* v. *The Oakford Corp.*, 181 F.R.D. 269, 271 (S.D.N.Y. 1998), concluded when faced with a similar set of facts, "the SEC never had any intention of providing discovery in this case but nonetheless permitted the case to proceed, thereby seeking the advantage of filing its charges without having to support them." To use the federal courts in this way – "as a forum for filing serious civil accusations that one has no intention of pursuing until a parallel criminal case is completed" – is "a misuse of the processes of these courts." *Id.* at 273. The Court should not permit the government to manipulate the court system this way, especially where such conduct has serious consequences for an individual.

B. The Relevant Factors Strongly Favor Denial of a Blanket and Indefinite Stay

As the USAO acknowledges, *see* Gov't Mem. at 10-11, in deciding a stay application where there are parallel proceedings, courts generally consider and balance the following factors on a case-by-case basis: 1) the potential prejudice to the defendant; 2) the interests of the plaintiff in proceeding expeditiously with the litigation; 3) the interests of the courts; 4) the public interest; and 5) the interests of persons not parties to the civil litigation. *See, e.g., SEC* v. *Jones*, No. 04 Civ. 4385, 2005 WL 2837462, at *1 (S.D.N.Y. Oct. 28, 2005). Given the USAO's failure to make a particularized showing of prejudice if the case were to proceed, the equities overwhelmingly favor denial of the USAO's application for a blanket and indefinite stay. Such a stay would not be in the interests of Mr. Tannin, the SEC, the Court, or the public. Discovery should be allowed, and the Court can address any particular concerns as they arise.

1. A Blanket Stay Would Severely Prejudice Mr. Tannin

Contrary to the USAO's assertions, Mr. Tannin would be severely prejudiced by a blanket stay, not benefit from it. The SEC announced the filing of its 36-page complaint against Mr. Tannin in a widely-covered press conference. The complaint contains serious charges of misconduct and wrongdoing. At the same time, the USAO unsealed an indictment charging him with conspiracy, securities fraud, and wire fraud. The charges against Mr. Tannin have been highly publicized and no doubt will continue to be. The consequences of the filings have been devastating to Mr. Tannin, personally and professionally, and to his family.

Mr. Tannin has a strong interest in a timely resolution to this case and clearing his name. The allegations of wrongdoing against Mr. Tannin are unfounded and Mr. Tannin should be given every opportunity to prepare to contest them. Where, as here, a defendant's "reputation and credibility have been called into question" and the "pendency of [the] litigation continues to cloud his future career and personal life," the defendant "deserves a timely opportunity to clear his name." *Jones*, 2005 WL 2837462, at *2 (denying USAO's request for a stay). *See also SEC* v. *Treadway*, No. 04 Civ. 3464, 2005 WL 713826, at *3 (S.D.N.Y. Mar. 30, 2005) (recognizing that defendants "plainly have an important interest in moving to trial swiftly . . . since the pendency of this litigation is an economic burden on them and a cloud on their careers and personal lives" and that a "long stay of discovery" would be a "significant hardship," but granting a stay because the criminal trial was scheduled to begin in less than a month); *Sandifur*, 2006 WL 3692611, at *3 (where defendants were facing serious civil charges, they had "a strong interest in a timely resolution"); *SEC* v. *Yuen*, No. 03 Civ. 4376, Mem. of Dec. at 5 (C.D. Cal. Oct. 28, 2003) (Ex. M) (finding that vindication for defendants would come sooner if criminal and civil cases proceeded currently, thus denying stay would serve "any potential interest the Defendants' [*sic*] have in seeing their names cleared").

A blanket stay would also severely prejudice Mr. Tannin's ability to prepare to defend himself in this action, which, contrary to the USAO's suggestion, he intends and wants to do. The SEC and the USAO have already obtained extensive discovery for use in the civil and criminal cases, including document discovery from Mr. Tannin, yet the USAO seeks to preclude Mr. Tannin from investigating the facts. There is no reason why Mr. Tannin should not be able to pursue evidence through discovery. *See Saad*, 229 F.R.D. at 92 (denying USAO's attempt to prevent SEC from turning over notes made by corporate employees because notes were unquestionably relevant to the defense of the civil case, might well be "*Brady*" material, and defendants were "fully entitled to the timely discovery that federal law grants them in defending such an action").

In addition, the USAO speculates that discovery in the SEC action will be unnecessary because once the USAO obtains a criminal conviction, the SEC can then use that conviction to obtain a judgment in its own case. Indeed, the USAO goes so far as to argue that Mr. Tannin would benefit from a stay because if convicted, a trial in the SEC action may never occur. *See* Gov't Mem. at 11-12. Arguments along these lines are simply inappropriate. The USAO should not be asking the Court to presume that Mr. Tannin is guilty and will be convicted. Rather, at this stage, the presumption of innocence requires that we assume that Mr. Tannin will be acquitted, which means a stay pending the criminal trial would serve only to delay resolution of this case, unless the SEC agreed – as we hope it would – to dismiss its case after Mr. Tannin's acquittal.

The USAO's conclusory assertion that a stay would also benefit Mr. Tannin because he would avoid having to decide whether to assert his Fifth Amendment right against selfincrimination in the SEC case, an assertion that could be used to make an adverse inference against him, must also be disregarded. *See* Gov't Mem. at 12. Such a dilemma can be addressed if and when it arises.[7]

The SEC has been investigating this matter for more than a year. Mr. Tannin's ability to defend himself fully in a timely manner will be severely compromised if a blanket and indefinite stay were imposed.

2. Allowing this Action to Proceed Serves the SEC's Interest in an Expeditious Resolution

The USAO claims that the SEC would benefit from, as opposed to be prejudiced by, a stay. *See* Gov't Mem. at 12. It is hard to see how that can be given the SEC's repeated public pronouncements touting its aggressive and relentless pursuit of securities fraud.

In addition, it is difficult to imagine how proceeding could prejudice the SEC. The SEC has had unilateral access to documents and witnesses for more than a year, including documents produced by Mr. Tannin. Mr. Tannin is the one who has been deprived of access to documents and other relevant materials.

As the court concluded in the *Reyes* case, "[w]hen you file the charges, you are deciding the defense should proceed." *Reyes*, Oct. 4, 2006 Hearing Tr. at 5:19-5:20 (Ex. I). *See also Bradstreet*, Oct. 16, 1995 Hearing Tr. at 10:8-10:13 (Ex. G) ("[I]f someone decides they would like to bring a case in federal court for whatever reason, then they better be prepared to move the

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7 A party's invocation of the Fifth Amendment, in any event, would not entitle the USAO or the SEC to a total stay of this action. Rather, as the Second Circuit has instructed, "because *all* parties – those who invoke the Fifth Amendment and those who oppose them – should be afforded every reasonable opportunity to litigate a civil case fully and because exercise of Fifth Amendment rights should not be made unnecessarily costly, courts, upon an appropriate motions, should seek out those ways that further the goal of permitting as much testimony as possible to be presented in the civil litigation, despite the assertion of the privilege." *United States* v. *Certain Real Property & Premises Known as 4003-4005 5th Ave., Brooklyn, N.Y.*, 55 F.3d 78, 83-84 (2d Cir. 1995) (citation omitted).

case right along, not bring the case and then call for a time out, whether induced by another party or not.") If the SEC truly has "no position" regarding the USAO's application for a stay, *see* SEC Response at 2, it should not have filed its enforcement action in the first instance.

3. Proceeding with Discovery Serves the Court's Interest in Managing Its Docket and Seeing Cases Through Quickly

The USAO suggests that a stay would save the Court time and resources because if the criminal case proceeds to trial and results in convictions, it "could greatly streamline" the SEC case. Gov't Mem. at 12. The USAO also claims a stay is "likely to narrow or eliminate factual issues" in the SEC case. *Id.* These arguments, again, ignore the presumption of innocence and assume that issues in the criminal trial will be resolved against Mr. Tannin. As one court has observed, "This is not as simple a conclusion to reach as the Government argues. It depends on law and facts not yet before the Court." *Yuen*, Mem. of Dec. at 9 (Ex. M); *see also id.* at 7 ("Although some issues may be resolved in the criminal action that would not need to be relitigated in the civil action, there is no certainty that this would occur.").

It is also unlikely that a stay of the SEC case in favor of the criminal action would streamline discovery in the civil case. The SEC complaint differs from the criminal indictment and will require separate discovery.

The Court's interest in the efficient administration of justice is best served by proceeding with this case in the ordinary course, including the normal discovery process, so that it can be expeditiously resolved. *See United States* v. *Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 811 F. Supp. 802, 808 (E.D.N.Y. 1992) ("convenience of the courts is best served when motions to stay proceedings are discouraged"). As the *Yuen* court concluded, "Effective management of this Court's docket requires the Court to usher cases through the civil process quickly and fairly. This is an interest that would definitely be harmed by granting a stay." *Yuen*, Mem. of Dec. at 9-10 (Ex. M).

4. A Blanket Stay Is Not in the Public Interest

The Chairman of the SEC testified before the U.S. Senate that, "[f]irst and foremost, the SEC is a law enforcement agency," that the SEC's mission to protect investors and maintain orderly markets "is more important now than it has ever been," and that investors could expect vigorous enforcement efforts. *Testimony Concerning Recent Developments in the U.S. Financial Markets and Regulatory Responses* (Ex. B). Given these pronouncements, it is difficult to see how the USAO can claim that a stay would be in the public interest.

The SEC's complaint raises issues that have serious ramifications for the world's credit markets. The public interest is best served by a resolution of this action. Indeed, in securities cases, the public "interest in the maintenance of and preservation of the integrity of the securities markets . . . can be substantially prejudiced by stays imposing significant delays upon the civil proceeding." *Parallel Civil and Criminal Proceedings*, 129 F.R.D. at 205.

In addition, contrary to the USAO's contention, the criminal case will not vindicate substantially the same public interest underlying this action. *See* Gov't Mem. at 17. The SEC has opposed motions to stay discovery sought by defendants involved in parallel criminal proceedings based on its assertion that the SEC's interest is separate from and additional to the USAO's. *See, e.g., SEC* v. *Gilbert*, 79 F.R.D. 683, 684-85 (S.D.N.Y. 1978).[8]

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[8] The USAO's citation to *Volmar Distribs., Inc.* v. *N.Y. Post Co.*, 152 F.R.D. 36 (S.D.N.Y. 1993), for the proposition that prosecution of the criminal case would vindicate substantially the same public interest underlying the SEC's civil action is misplaced. *See* Gov't Mem. at 17. *Volmar* was not an SEC enforcement action brought as part of its mission to protect the public interest. It was an action brought by a group of private plaintiffs asserting antitrust and RICO violations where the defendants sought to stay discovery pending resolution of two criminal matters against them for enterprise corruption. In that context, the court held that the criminal

5. The USAO Has Failed to Make a Specific Showing of Prejudice to Its Interests or the Interests of Other Non-Parties

To obtain a stay, the USAO is required to make a "specific showing of the harm it will suffer without a stay and why other methods of protecting its interests are insufficient." *In re Ramu Corp.*, 903 F.2d 312, 320 (5th Cir. 1990) (noting that "[s]ince any relationship between criminal and civil cases raises the prospect of civil discovery abuse that can prejudice the criminal case, good cause requires more than the mere possibility of prejudice"). *See also Horn* v. *District of Columbia*, 210 F.R.D. 13, 15 (D.D.C. 2002) (the "mere relationship between criminal and civil proceedings, and the resulting prospect that discovery in the civil case could prejudice the criminal proceeding, does not establish the requisite good cause for a stay") (internal quotations and citation omitted). The USAO cannot rely on generic assertions or conclusory allegations of prejudice. *See, e.g., Banco Cafetero Int'l*, 107 F.R.D. at 366 (to justify a stay, the USAO must come forward with "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements") (internal quotations and citation omitted). The USAO has fallen far short of meeting its burden.

The USAO argues that a stay is necessary to preserve the secrecy of its ongoing criminal investigation. *See* Gov't Mem. at 2. At the September 26, 2008 status conference in the criminal case, however, the Court ordered the USAO to file any superseding indictment by December 5, 2008. The parties can easily proceed with document discovery while the USAO concludes its criminal investigation. To grant a blanket stay now, as the USAO urges, is simply unnecessary.

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prosecutions would advance the same interests that the private plaintiffs sought to vindicate. *See Volmar Distribs.*, 152 F.R.D. at 40.

The USAO also asserts that a stay is necessary to prevent Mr. Tannin from taking "unfair advantage of broad civil discovery rules, to the detriment of the government and its witnesses." Gov't Mem. at 13. The USAO's generic and unsupported charge of "unfair advantage" is based on the flawed assertion that Mr. Tannin is entitled only to the limited discovery available in the criminal proceeding. But that is not the case. As a result of the government's decision to file simultaneous criminal and civil actions against Mr. Tannin, Mr. Tannin is both a criminal and civil defendant. And as a civil defendant, Mr. Tannin is entitled to broad civil discovery. The pending criminal indictment does not change this fact. As Judge Rakoff emphasized in denying the government's motion for a stay in *Saad*, "the defendants are not just facing a criminal indictment; they are also facing a very serious SEC civil action, and they are thus fully entitled to the timely discovery that federal law grants them in defending such an action." *Saad*, 229 F.R.D. at 92; *see also Bradstreet*, Oct. 16, 1995 Hearing Tr. at 13:21-14:16 (Ex. G) (by filing civil and criminal actions at the same time, the government opened itself "up to the civil process and the civil discovery process").

Limitations on discovery in criminal cases are to protect against perjury and manufactured evidence, the intimidation of prospective witnesses or government informants, and surprises by the defendant. *See* Gov't Mem. at 14; *see also Campbell*, 307 F.2d at 487, n.12. None of those concerns exists here.

First, the government has been investigating this case for over a year. The SEC and the USAO have already interviewed witnesses and subpoenaed the documents they think are relevant to prove their cases. Government witnesses have also testified before the grand jury. There is thus no risk that discovery in the SEC action would result in manufactured evidence or perjury. *See Yuen*, Mem. of Dec. at 11-12 (Ex. M) (where SEC had gathered voluminous documents and conducted many depositions, there was little opportunity for perjury or manufacture of evidence); *Poirier*, Order at 4 (Ex. J) (SEC's extensive investigation, including depositions of witnesses, would "adequately guard against the risks of perjury and the manufacture of evidence").

Second, the USAO cannot demonstrate that allowing discovery will result in witness intimidation. This white collar case does not involve confidential informants, witnesses who have not already provided testimony to the government, or witnesses who are not known to Mr. Tannin. There can be no serious claim that witness intimidation would occur if discovery is allowed, particularly given that many (if not all) of the witnesses are already represented by counsel. Indeed, courts have granted witness lists in advance of trials in criminal cases. *See, e.g., United States* v. *McDonald,* No. 01 Cr. 1168, 2002 WL 2022215, at *2 (E.D.N.Y. Aug. 06, 2002); *United States* v. *Upton*, 856 F. Supp. 727, 750-51 (E.D.N.Y. 1994); *United States* v. *Savin*, No. 00 Cr. 45, 2001 WL 243533, at **6-9 (S.D.N.Y. Mar. 7, 2001).

Third, there is little risk that discovery in the SEC case will produce surprises for the government. The only surprises will be from exculpatory evidence that the government chose not to pursue in its investigation. The USAO should not be allowed a stay to prevent the discovery of such evidence, particularly given that if the USAO had such evidence in its possession it would be required to turn it over to Mr. Tannin. The purpose of discovery in civil and criminal cases is to enhance the truth-seeking process. The USAO, no less than Mr. Tannin, should be concerned with finding out the truth, which can only be accomplished if discovery is allowed and a more complete factual record is developed.

The USAO's speculation that depositions might impair the usefulness of potential witnesses by creating impeachment material likewise does not justify a stay. As the court concluded in *Oakford*, if "defendants' discovery requests simply result in the happenstance that in defending themselves against the serious civil charges that another government agency has chosen to file against them they obtain certain ordinary discovery that will also be helpful in the defense of their criminal case, there is no cognizable harm to the government in providing such discovery beyond its desire to maintain a tactical advantage." *Oakford*, 181 F.R.D. at 272-73. In fact, the USAO has an interest in knowing whether the testimony of its potential witnesses can withstand scrutiny. In any event, particular concerns can be addressed at the appropriate time. *See, e.g., SEC* v. *Saad*, 384 F. Supp. 2d 692, 693-94 (S.D.N.Y. 2005) (allowing discovery in parallel SEC case to proceed in normal course but open to postponing depositions in appropriate circumstances upon application). There is no justification for granting a blanket stay now.

The USAO's argument "boils down in the end to its standard complaint that the defendants are getting a 'special advantage' because, if they were only facing a criminal indictment, they would not be entitled to [the discovery] at this time." *Saad*, 229 F.R.D. at 92. Courts have routinely found such generalized assertions insufficient to warrant the imposition of a stay. *See, e.g., Banco Cafetero Int'l*, 107 F.R.D. at 366 (denying stay where government made only conclusory allegations of prejudice to criminal case from civil discovery); *Sandifur*, 2006 WL 3692611, at *3 (government's generalized assertions about need to protect integrity of investigation and concern about broader discovery available in civil action carried "little weight" when balanced against interests of defendants, court, and public in efficient resolution of civil matter); *Poirier*, Order at 4 (Ex. J) (stay denied where government "ma[de] much of the differences between the available discovery in the civil and criminal proceedings," but "failed to present any specific showing of potential harm that it will suffer if this action is not stayed").

C. Any Stay or Limitation on Discovery Must Be Narrowly Tailored

To the extent the Court has any concerns about the scope of discovery, the appropriate remedy would be to address particular concerns as they arise, not to impose a blanket stay now when the USAO has failed to articulate any specific harm.

For instance, in *SEC* v. *Jones*, 2005 WL 2837462 (S.D.N.Y. Oct. 28, 2005), Judge Sweet rejected the government's request for a blanket stay, but instructed the SEC and the defendant to advise the government of the discovery being conducted "three weeks in advance to permit the Government to apply for a stay of discovery which would impact its criminal case." *Id.* at *2. The court reached a similar outcome in *SEC* v. *Doody*, 186 F. Supp. 2d 379 (S.D.N.Y. 2002). There, Judge Kaplan rejected the USAO's request for an all-inclusive stay and imposed a much more limited one, pending a further application by the government for relief "upon a specific showing that the particular discovery sought would threaten to prejudice the criminal prosecution." *Id.* at 382.

Judge Rakoff's approach in *Saad* is also instructive. There, at the outset of the parallel criminal and civil cases, the court held that discovery in the SEC case should proceed in the normal course but made an exception for the depositions of two defendants who were also defendants in the parallel criminal case and of four cooperating co-defendants who were likely to testify for the government in the criminal action. Judge Rakoff also suggested that it might be appropriate to stay other depositions before the criminal trial, but refused to define the "universe of circumstances in which such a delay might be appropriate." *Saad*, 384 F. Supp. 2d at 694. Instead, the court instructed the government to make an application demonstrating the specific prejudice it would suffer if it was concerned about certain depositions proceeding before the criminal trial. *Id.* *See also Nakash*, 708 F. Supp. at 1365-66 (rejecting government request for blanket stay, noting that concerns could be addressed by appropriate limiting orders).

If the Court has any concerns here, it could, for example, order document discovery to proceed first and address depositions later as the need arises. But on this record, a blanket stay is not warranted.

II. THE COURT SHOULD DENY THE USAO'S MOTION TO INTERVENE

The only reason the USAO seeks to intervene in this matter is to attempt to delay discovery in a case that the government itself initiated. Although the Court has discretion in considering a motion to intervene, because there is no basis for a blanket stay, the Court should deny the USAO's motion to intervene. *See Yuen*, Mem. of Dec. at 13-14 (Ex. M) (denying motion to intervene where sole purpose of intervention was to request stay and court had denied motion to stay); *SEC* v. *Roberts*, No. 07 Civ. 4580, Order at 1 (N.D. Cal. Sept. 25, 2007) (Ex. N) (same).

CONCLUSION

For the foregoing reasons, Mr. Tannin respectfully requests that the Court deny the USAO's application to intervene and to stay this action in its entirety.

Respectfully submitted,

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